No. 01-104

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In The

Supreme Court of the United States

ELMER CRIDER, MARYLN CRIDER, LANNY HELMS, MARTHA HELMS, BRUCE GAMBELL, BRIAN MESSICK, LYNETTE MESSICK, GEORGE MALLON, NANCY MALLON, LARRY THOMPSON, and KAREN THOMPSON,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, RONALD K. STEWART in his official capacity as County Commissioner, PAUL DANISH in his official capacity as County Commissioner, CITY OF LOUISVILLE, THOMAS DAVIDSON in his official capacity as Mayor, CITY OF LAFAYETTE, CAROLYN McINTOSH in her official capacity as Mayor, CITY OF BROOMFIELD, and WILLIAM BERENS, in his official capacity as Mayor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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STATEMENT OF THE CASE

The Petitioners (the "Property Owners") own six, ten-acre lots within a residential subdivision (the "Subdivision Properties") in Boulder County, Colorado. Five of the lots are improved with single-family residences, but the Property Owners wish to scrape off their residences and rezone their land for commercial development. In 1998, Boulder County, the City of Louisville, the City of Lafayette, and the City of Broomfield (the "Local Governments") began to develop an Intergovernmental Agreement (the "IGA"). The goals of the Local Governments in entering into the IGA were to prevent urban sprawl and preserve individual rural communities as well as distinct and separate municipalities.

In order to preserve rural areas within the boundaries of the IGA, certain properties, including the Subdivision Properties, were designated "Rural Preservation." Rural Preservation properties remained in the unincorporated area of Boulder County (the "County") and remained zoned Agricultural, which is the County's basic farming and rural residential zone district. The IGA allowed the Property Owners to continue using their properties in the same manner as they had used them prior to the adoption of the IGA and to further develop the Subdivision Properties in accordance with County regulations.

Prior to the adoption of the IGA, the Local Governments notified the Property Owners that the Subdivision Properties may be included in the IGA. Subsequently, the Property Owners appeared at several hearings before the Local Governments and objected to having the Rural

Preservation designation placed upon their properties. As a result of the Property Owners' objections, the County requested that the IGA be modified. Specifically, the County requested that the IGA include a provision that would allow the Property Owners to apply for an increase in density from 1 unit per 10 acres to 1 unit per 4.5 acres. Furthermore, the County negotiated for a provision that required Louisville to use its best efforts to require an undeveloped buffer along the southern side of the Subdivision Properties.

The Local Governments ratified the IGA with the new provisions requested by the County. In addition to the modifications addressing the Property Owners' concerns, the IGA contained a provision which allows the Property Owners to apply for greater density and/or annexation into another municipality.[1] Despite these provisions, the Property Owners have never applied to the County for rezoning or applied to any city for annexation.

Storage Technology Corporation ("StorageTek") owns and operates several industrial buildings located approximately one-half mile south of the Subdivision Properties in the City of Louisville. The StorageTek campus and the Subdivision Properties are separated by an unincorporated 80-acre property owned by StorageTek (the "StorageTek Property"). Unlike the Subdivision

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[1] The Property Owners' Petition for Writ of Certiorari ("Petition") contains a misstatement because it incorrectly indicates that "Paradise Lane cannot be annexed by any of the cities" for 30 years. Petition at 3. The IGA allows annexation if approved through a plan amendment process.

Properties, the StorageTek Property is singly-owned, undeveloped, and not subdivided. The StorageTek Property received no designation under the IGA.

The Property Owners filed suit against the Local Governments in the United States District Court for the District of Colorado. The Property Owners claimed, among other arguments, that the IGA on its face deprived them of their right to equal protection. The Complaint contained no allegations of personal animus or vindictive action by the Local Governments or government officials. Instead, the Property Owners complained that zoning decisions made by city, county, and state officials changed the character of the area. For example, the Property Owners alleged that the construction of a school near the Subdivision Properties obscured their view of the mountains; that an intersection constructed near the Subdivision Properties made the Subdivision Properties too easily accessible; and that a new mall nearly a mile from their properties would generate too much traffic.

The Local Governments filed a motion to dismiss, which was granted by the district court. In ruling that the Property Owners failed to state an equal protection claim, the district court determined that there were many plausible reasons for the distinctions in the IGA, including state and regional interests to preclude increased development, the need to preclude urban sprawl, and preservation of rural areas to prevent traffic at interchanges. Petition at 39a. The district court also found that there was a sufficient distinction between the StorageTek Property and the Subdivision Properties.

The Property Owners appealed to the Tenth Circuit, which upheld the district court's dismissal by a unanimous decision. The Tenth Circuit held that, even when the facts were viewed in a light most favorable to the Property Owners, the Subdivision Properties and the StorageTek Property were not similarly situated and therefore they had failed to state a claim for relief.

REASONS THE WRIT SHOULD BE DENIED

This case is a local zoning dispute which does not belong in federal court and certainly does not belong in the United States Supreme Court. Rather than pursuing the numerous local and state avenues of redress available to them, the Property Owners have attempted to turn a disagreement with comprehensive local land use decisions into a case about civil rights. Both the district court and the Tenth Circuit found that the Property Owners have failed to allege facts which indicate this local dispute warrants attention by the federal courts, and this Court should do the same by denying the Petition.

I. IT IS WELL-ESTABLISHED THAT NO EQUAL PROTECTION CLAIM IS MADE WHEN DISSIMILAR PROPERTIES ARE TREATED DIFFERENTLY

The Equal Protection Clause of the Fourteenth Amendment "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). From early on, this Court has made it clear that "the Constitution does not require things which are different in fact or

opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). When a state or local government treats things differently that obviously are different, the federal courts need not engage in an equal protection analysis.

For example, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287 n.12 (1990), the petitioners raised the argument that Missouri violated the Equal Protection Clause because it treated incompetent patients differently from competent ones. The petitioners in *Cruzan* relied on the statement by this Court in *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) that the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *Id.* This Court refused to engage in an in-depth factual analysis as to whether, in fact, incompetent persons were similarly situated to competent ones. Instead, the Court stated "[t]he differences between the choice made *by* a competent person to refuse medical treatment, and the choice made *for* an incompetent person by someone else . . . are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which to do not apply to the former class." *Id.* (emphasis in original). As demonstrated by *Cruzan*, considering the obvious differences between things that are alleged to be "similarly situated" is perfectly appropriate.

In this case, the differences between the Subdivision Properties and the StorageTek Property are obvious on the face of the Complaint. Ruling from the bench, the district court stated: "there is a sufficient distinction . . .

between the plaintiffs' property and StorageTek. StorageTek is an employer of many people in the area. They may have need for expansion. Their land is undeveloped . . . " Petition at 39a. Similarly, the Tenth Circuit stated:

> Even taking the facts alleged in the complaint as true and viewing them in the light most favorable to Paradise Lane Owners, we find that Paradise Lane Owners have failed to allege facts sufficient to establish that they are similarly situated to StorageTek. While the properties owned by Paradise Lane Owners and StorageTek both allegedly total eighty acres and are adjacent, that is where the similarity ends. According to Paradise Lane Owner's complaint, StorageTek is a single commercial entity. Paradise Lane Owners, in contrast, are individual owners of residential property. StorageTek owns the single eighty acre lot under consideration as well as an adjacent lot on which it has built a large, industrial campus. Paradise Lane Owners' land is subdivided into six separate, individually owned lots, one lot totaling twenty acres and the other five lots totaling ten acres (with a ten acre lot unoccupied). StorageTek's eighty acre lot is undeveloped. Paradise Lane Owners' lots have been developed into separate private residences occupied by Paradise Lane Owners and their families.

Petition at 6a. As observed by the courts below, the differences between the Subdivision Properties and the StorageTek Property are numerous and readily apparent from the face of the Complaint.

Contrary to the Property Owners' argument, the Tenth Circuit properly applied Fed. R. Civ. P. 12(b)(6) in concluding that the subject properties were not similarly situated. The facts relied upon by the Tenth Circuit were undisputed facts alleged by the Property Owners in their Complaint. "[W]here specific allegations clarify the meaning of broader allegations, they may be used to interpret the complaint as a whole." *Pegram v. Herdrich*, 530 U.S. 211, 230 (2000). Although the Property Owners argue that, given the opportunity, they would present photographs, conduct site visits, and present "land experts" to argue that the properties are similar, none of this evidence would change the immutable facts as alleged in the Complaint and identified by the Tenth Circuit which demonstrate the differences between the properties. Accordingly, neither the district court nor the Tenth Circuit erred in determining that the Property Owners had failed to state facts sufficient to support their equal protection claim.

Even if the Tenth Circuit had misapplied Fed. R. Civ. P. 12(b)(6) in upholding the district court's order of dismissal, it would not be sufficient reason for this court to grant the Petition. The Property Owners do not claim that the Tenth Circuit improperly stated the standard for dismissing a case under Fed. R. Civ. P. 12(b)(6), but only that it "fundamentally misapplied" it. Petition at 15. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Thus, even if the Tenth Circuit did err, the Petition should not be granted.

II. THE TENTH CIRCUIT'S FACT-BASED INQUIRY DEMONSTRATES CERTIORARI IS NEITHER APPROPRIATE NOR NECESSARY

Because this is a case in which the Petitioners were unable to allege facts sufficient to support their equal protection claim, the Tenth Circuit's ruling does not suggest a need for clarification on the issue of similarly situated properties. Neither the district court nor the Tenth Circuit felt it was even a close question as to whether the StorageTek Property and the Subdivision Properties were similarly situated. No record beyond the Complaint itself was developed on the similarities and differences between the properties in question. Accordingly, this Court's decision would be limited to a determination of whether the facts as alleged in the Complaint were sufficient to state a claim that the properties were similar. Such a limited, fact-based determination would do little to guide lower federal courts.

Even if this case provided a broader basis for a decision, nothing in the Petition suggests that this Court could create standards which would provide guidance beyond *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va.*, 488 U.S. 336, 340 n.3 (1989); *Williams v. Vermont*, 472 U.S. 14, 27 (1985); and *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 18 (1988). As demonstrated by these cases and urged by the Property Owners in the Petition, whether one property is similarly situated to another is a fact-based determination which does not lend itself to in-depth legal analysis. As articulated by the Seventh Circuit: "While we have

repeatedly discussed the similarly situated requirement[,] . . . these discussions are rarely extensive and do not provide any magic formula for determining whether someone is similarly situated. This is due, seemingly, to the essentially factual nature of the inquiry. Different factors will be relevant for different types of inquires [sic] – it would be imprudent to turn a common-sense inquiry into a complicated legal one." *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001). Moreover, the Property Owners fail to point out any decision from any other circuit which is contrary to this Court's prior determinations in this area. The Property Owners admit that "the question is one of fact . . . focusing on the 'relevant' or 'material' factual aspects." Petition at 18.

Because the "similarly situated issue" does not lend itself to any particular rule or criteria, the most the Court could do in this case is reaffirm that determining whether properties are similarly situated is essentially a fact-based inquiry. Such a decision would serve no purpose. The Tenth Circuit's determination was based on the facts alleged in the Complaint. A plaintiff is required to state facts sufficient to state an equal protection claim before being entitled to a hearing. If, as suggested by the Property Owners, the district court was required to hold a hearing under these circumstances, the federal courts would be burdened by an additional procedural step in equal protection cases, putting pressure on an already over-burdened federal judiciary. Thus, there is no reason the Court should grant certiorari in this case.

III. THE TENTH CIRCUIT, LIKE ALL OTHER CIRCUITS, REQUIRES PLAINTIFFS TO ALLEGE FACTS SHOWING THAT SIMILARLY SITUATED PROPERTY WAS TREATED DIFFERENTLY IN ORDER TO STATE AN EQUAL PROTECTION CLAIM

The Tenth Circuit's determination that the Property Owners failed to state facts sufficient to support their equal protection claim was not unique or unusual. In reaching its decision, the Tenth Circuit stated: "To state a valid equal protection claim . . . Paradise Lane Owners must 'allege facts sufficient to establish that [they are] similarly situated' to StorageTek." Petition at 5a (quoting *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998)). The requirement that a plaintiff initially identify a similarly situated group, person, or property is imposed by all of the circuit courts who have addressed this issue. *See Brown v. City of Oneonta, New York*, 221 F.3d 329, 337 (2nd Cir. 2000) (It is necessary to allege the existence of a similarly situated group that was treated differently when pleading a violation of the Equal Protection Clause.); *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 850 (3rd Cir. 1994) ("In order to maintain an equal protection claim . . . the plaintiffs must . . . allege and prove that they received different treatment from other similarly situated individuals or groups."); *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 276 (5th Cir. 2000) (no equal protection claim is stated when a plaintiff fails to allege facts showing similarly situated individuals were treated differently); *Sims v. Mulcahy*, 902 F.2d 524, 538 (7th Cir. 1990) ("In order to establish a *prima facie* case of discrimination violative of the equal protection clause,

[plaintiff] was required to demonstrate that she was treated differently from other similarly situated employees."); *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993) (a party claiming a violation of equal protection must establish he is similarly situated to others); *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996) (same).

The Property Owners argue that the Tenth Circuit's approach in this case is inconsistent with other lower courts because it allegedly did not consider the facts, or at least the relevant facts, alleged by the Property Owners. The premise of the Property Owners' argument is flawed. The Tenth Circuit specifically identified the undisputed facts that it considered when determining that the Subdivision Properties and the StorageTek Property were dissimilar. *See* Petition at 6a. Therefore, the Property Owners' argument that the Tenth Circuit's decision was contrary to other circuits which consider "the relevant facts" is baseless.

The Property Owners also argue that the Tenth Circuit's approach differed from other circuits because other plaintiffs have brought successful equal protection claims based on land use decisions in other lower courts. Many of these cases are as-applied equal protection claims which have no bearing on the Property Owners' facial challenge to the IGA. Furthermore, the Property Owners fail to identify any standard or rule of law imposed by the Tenth Circuit that was different than those used by other courts. Obviously, the facts alleged by the Property Owners in this case are different than the facts alleged in cases before other lower courts. The Property Owners have shown nothing to suggest that other lower courts

would have acted differently if the facts of this case were presented to them.

IV. PROPERTY OWNERS' EQUAL PROTECTION CLAIM WOULD HAVE BEEN DISMISSED EVEN IF THE SUBDIVISION PROPERTIES AND THE STORAGETEK PROPERTY WERE SIMILARLY SITUATED

The Property Owners' failure to allege facts sufficient to show that their properties were similar to the StorageTek Property was not the only flaw in their equal protection claim. Even if the Property Owners had gotten past this threshold issue, the case still would have been dismissed under the rational basis test. The Property Owners admit that they are not a suspect class which would subject the IGA to strict scrutiny. Thus, the IGA would be analyzed under the rational basis test:

> equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . [A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*. . . . Where there are "plausible reasons" for Congress' action, "our inquiry is at an end."

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (emphasis added) (quoting in part *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). The Tenth Circuit articulated its application of the rational

basis test in *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998).

Both the district court and the Tenth Circuit indicated that a rational basis existed for the distinction between the Subdivision Properties and the StorageTek Property in the IGA. The district court stated:

> in this case, there are certainly many plausible reasons set forth in the IGA for this type of agreement, [sic] we have state interests and regional interests to preclude increased development. I'm looking on page 1 of the IGA; to preclude urban sprawl. There are many other discussions of the need for keeping rural areas to prevent congestion at interchanges. There may in the future be a highway in this area. So throughout the IJA [sic], . . . there are many reasons stated, a number of justifications for the actions. And these do indeed provide a rational basis for IGA's distinctions.

Petition at 39a. Similarly, in the context of its discussion on the Property Owners' substantive due process claim, the Tenth Circuit found that: "[i]n their complaint, Paradise Lane Owners do not allege the absence of a conceivable rational relationship between the IGA and a legitimate governmental objective. . . . We find, therefore, that Paradise Lane Owners failed to allege the lack of a reasonably conceivable rational basis for the IGA." Petition at 6a-7a. As these findings demonstrate, a reversal by this Court would simply result in a dismissal on rational relationship grounds upon remand.

V. THE PROPERTY OWNERS DID NOT STATE A "VINDICTIVE ACTION" EQUAL PROTECTION CLAIM

The Property Owners did not allege facts or even conclusory allegations in their Complaint which support a "vindictive action" equal protection claim. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) does not stand for the proposition that a valid equal protection claim can be made simply by alleging that a governmental action was arbitrary or irrational. Instead, *Olech* requires proof that the cause of the differential treatment was illegitimate animus toward the plaintiff by the defendant.

The plaintiffs in *Olech* asserted that "the Village's demand was *actually motivated by ill will* resulting from the Olechs' previous filing of an unrelated, successful lawsuit against the Village." *Olech*, 528 U.S. at 563 (emphasis added). The Olechs' specific allegations of intent and ill will were essential to the Court's determination. The necessity of an allegation of vindictive action was emphasized by Justice Breyer in his concurring opinion:

> The Solicitor General and the village of Willowbrook have expressed concern lest we interpret the Equal Protection Clause in this case in a way that would transform many ordinary violations . . . into violations of the Constitution. . . . Zoning decisions . . . will often, perhaps almost always, treat one landowner differently from another. . . . This case . . . does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause. This is because the Court of Appeals found that in this case

> respondent had alleged an extra factor as well – a factor that the Court of Appeals called "vindictive action," "illegitimate animus," or "ill will." . . . [T]he presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.

Olech, 528 U.S. at 565 (Breyer, J. concurring) (citations omitted).

The Property Owners' equal protection claim is not about ill will or vindictiveness. Rather, it is about a zoning determination which they believe is unfair. Their equal protection challenge is a "facial constitutional challenge[ ]" to the IGA which "treats their property differently than the property owned by Storage Technology. . . . " Complaint at 2-3. The Complaint does not allege that the Subdivision Properties were placed in the rural preservation district because of personal animus, but instead allege: "The 'Rural Preservation' designation placed on the Paradise Lane property was a result of bargaining and a political trade-off." Complaint at 15. The Property Owners do not make a single allegation of personal animus or vindictive action by any of the Defendants. In a pleading filed with the district court, the Property Owners admitted they had no credible evidence of personal animus: "*Although not contained in the Complaint because of the present inability to satisfy Rule 11*, the Paradise Lane Owners have heard of statements made by one or more Louisville officials . . . indicating personal dislike for one or more of the Paradise Lane Owners." Plaintiffs' Response To Defendants' Motions To Dismiss at 10 (emphasis added).

In order to make this case sound like a vindictive action case rather than a run-of-the-mill zoning case, the Property Owners argue that improper procedures were used to adopt the IGA. The Property Owners complain that they were "misled" by the Local Governments while negotiations took place. However, nothing in *Olech* suggests that allegations of procedural irregularities in the legislative process give rise to a vindictive action equal protection claim.

The Complaint failed to state any allegation that would indicate that the IGA was the result of an intentional and vindictive action on a part of the Local Governments to deprive the Property Owners of their constitutional rights. Instead, this is a zoning decision about where commercial development should and should not occur. A classification is not violative of equal protection merely because it is "limited in the object to which it is directed or the territory within which it is to operate." *Hayes v. Missouri*, 120 U.S. 68, 71 (1887). "Defining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Communications, Inc.*, 508 U.S. at 315-16 (quotations omitted). Unlike the circumstances in *Olech*, there is nothing in this case to indicate an injustice may have been committed which would warrant review by this Court or give rise to a cognizable equal protection claim.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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